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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 169

BELLE MARACHOWSKY, ETC., AND J. H. MARACHOWSKY, ETC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Belle Marachowsky and J. H. Marachowsky, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on May 26, 1954, denying the prayer of the petition for rehearing and for an order expunging all proceedings in the Trial Court made in connection with this case subsequent to July 16, 1951.

OPINIONS BELOW.

The opinions of the United States Court of Appeals for the Seventh Circuit made February 26, 1954 and May 26, 1954 are not yet reported, but are found in the Record pages 18-28, 66-70. The opinion of May 26, 1954 is the one upon which this petition is predicated.

JURISDICTION.

The judgments of the Court of Appeals sought to be reviewed were entered on February 26, 1954 and May 26, 1954.

Petition for rehearing was timely filed and denied by an order entered April 22, 1954 on all questions considered by the Court prior to the filing of the Petition for rehearing. The question as to the designation and appointment of Judge Robert E. Tehan to hold District Court in the Western District of Wisconsin and as to the validity of his acts under said designation and appointment after the date fixed in the Order for the termination of said appointment (namely July 16, 1951), questions first raised on defendants' petition for rehearing were reserved and were considered by a panel of the Court consisting of Judges Duffy, Lindley and Swaim.

On May 26, 1954, the petition for rehearing and the request for an order expunging all proceedings in the trial court subsequent to July 16, 1951 were denied.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1). See also Rule 37 (b) of the Federal Rules of Criminal Procedure, promulgated February 8, 1946.

QUESTIONS PRESENTED.

1. Did the Order made by the Honorable J. Earl Major, Chief Judge of the United States Court of Appeals for the Seventh Circuit, dated July 5, 1951, in words and figures as follows, to-wit:

> "Pursuant to the Provisions of Title 28 United States Code Section 292, I, J. Earl Major, Chief Judge of the United States Court of Appeals for the Seventh Circuit, finding that it is in the public interest, do hereby designate and assign Honorable Robert E. Tehan, a United States District Judge of the Eastern District of Wisconsin in the Seventh Circuit, to perform the duties of a District Judge and to hold District Court in the Western District of Wisconsin, during the period beginning July 9, 1951, and ending July 16, 1951, and for such further time as may be required to complete unfinished business."

give jurisdiction to Judge Tehan to commence the trial of this case in the Western District of Wisconsin (on October 16, 1951) after the date fixed in said Order for the termination of his duty in said District on to-wit July 16, 1951?

2. Did Judge Tehan have jurisdiction to commence the trial of this cause (on October 16, 1951) after the termination date (July 16, 1951) fixed in the order of designation and assignment under that portion of the aforesaid order "and for such further time as may be required to complete unfinished business", because he arraigned the defendants, took their pleas of not guilty and set the case for trial on September 25, 1951, more than sixty days after the termination date fixed in the order?

STATUTES INVOLVED.

Title 28, U. S. C., provides:

Section 292. District judges

(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

(b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

(c) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

Section 296. Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such

period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

STATEMENT.

Petitioners, Belle Marachowsky and J. H. Marachowsky, for the first time in the petition for rehearing filed in the United States Court of Appeals asked for an Order expunging all proceedings in the Trial Court subsequent to July 16, 1951 on the premise that the trial was conducted by a judge who had no jurisdiction, was not duly designated and assigned and, therefore, the proceedings had were a nullity, void and without jurisdiction.

The indictment in this cause (Original Common Law Record pages CR 10-28) was returned and filed in the District Court of the United States for the Western District of Wisconsin on June 29, 1951.

The defendants filed an affidavit of prejudice on July 2, 1951, against the Honorable Patrick T. Stone; that no action was taken on said affidavit (Original Common Law Record pages CR 32-33). Thereafter, on July 5, 1951, the Honorable J. Earl Major, Chief Judge of the United States Court of Appeals for the Seventh Circuit, made the following order:

> "Pursuant to the Provisions of Title 28 United States Code Section 292, I, J. Earl Major, Chief Judge of the United States Court of Appeals for the Seventh Circuit, finding that it is in the public interest, do hereby designate and assign Honorable Robert E. Tehan, a United States District Judge of the Eastern District of Wisconsin in the Seventh Circuit, to perform the duties of a District Judge and to hold District Court in the Western District of Wisconsin, during the period beginning July 9, 1951, and ending July 16, 1951, and for such further time as may be required to complete unfinished business." (Record page 72.)

On July 9, 1951, Judge Tehan sat in the Western District of Wisconsin and the defendants were arraigned and pleaded not guilty and the cause was set for trial on September 25, 1951 (Original Common Law Record page CR 38).

On October 16, 1951, without any Order of designation and assignment, said Judge Robert E. Tehan came to the Western District of Wisconsin and commenced the trial of this cause which resulted in verdicts of guilty (Original Transcript of Record, Vol. 1, page 1). Sentence was imposed on the defendants from which judgment appeals were taken to the Court of Appeals for the Seventh Circuit and the cause was affirmed, except as to Count 13. The opinion of the Court of Appeals is reported in 201 F. 2d page 5. Thereafter, certiorari was denied by this Court.

The crucial point presented in the Petition for Rehearing for the first time, is that the Court as constituted on October 16, 1951 and subsequent thereto with Judge Tehan presiding lacked a duly assigned and designated judge to hear and determine the same, and that all proceedings had are null and void and of no force and effect, and that all his acts and doings were a nullity because there was no jurisdiction vested without a legally appointed or designated judge.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that when Judge Tehan arraigned the defendants, took their pleas of not guilty and set the case for trial after the period of his designation and assignment had expired, he had unfinished business to complete under the order of designation and assignment, and therefore, had jurisdiction to sit as trial judge.

2. In holding that since Judge Tehan is a duly au-

thorized district judge of another district, purporting to act upon an assignment which he believed gave him jurisdiction, and in pursuance thereof, performed the duties of a district judge in another district under such color of right that he was a *de facto* judge if not a judge *de jure*.

REASONS FOR GRANTING THE WRIT.

1. The court below refused to follow the applicable Supreme Court decision which holds that a Judge assigned to another district must act within the period of his designation and assignment, and thereafter, he has no further jurisdiction in the district to which he had been assigned, save to complete unfinished business, as provided by statute.

2. The court below refused to follow the decision of the Supreme Court and is directly in conflict with decisions of other circuit courts in holding that the term "unfinished business" means not only to complete cases tried by the court while he sat on such designation and assignment, but also to commence the trial of cases in the assigned district after the expiration of the designation and assignment, because he took an arraignment and plea during the designated period.

This court has held in *Frad* v. *Kelly*, 302 U. S. 312, 58 S. C. 108, 82 L. Ed. 282, that wherein an assigned judge had presided at the trial of a cause he has power though the period of his service had expired to perform the functions which are *incidental* and *supplemental* to *matters heard within the period* and left undecided at the expiration of the period.

The *Frad* case holds that the designated judge may enter decrees and orders and file opinions necessary to dispose of matters heard by him during the designated period, but the act of Congress goes no further. This decision holds

that he had no jurisdiction after the designated period to hear any matter which had not been submitted to him during the period; that his acts in so doing are null and void because the unfinished business contemplates only matters supplemental or incidental to the duties performed within the designated period.

The taking of an arraignment and plea by a judge during his period of designation and assignment does not make the trial of a case after the expiration of his designation and assignment incidental or supplemental to the duties performed by him during the designated period.

In this case, arraignment and pleas were taken on July 9, 1951. Judge Tehan's designation and assignment in the foreign district expired on July 16, 1951. It had been fully completed and terminated on July 16, 1951. He had no other order of designation and assignment. The period was July 9 to July 16, 1951. The trial not being supplemental or incidental to the perfunctory matters submitted to him during the week, he had under the *Frad* case, no right, color or claim of right to return to the Western District of Wisconsin on October 16, 1951 to commence the trial of this case. He was never assigned to try these particular cases, but was assigned in the public interest.

In *Steckel* v. *Lurie, et al.*, 185 F. 2d 921 (Sixth Circuit) the court held that a retired judge can perform duties only when designated and assigned to perform such judicial duties, and then solely in accordance with the designation and assignment and no further.

In the instant case, Judge Tehan was assigned in the public interest to sit in the Western District for a period commencing with July 9, 1951 and ending on July 16, 1951 and for such further time as may be necessary to complete unfinished business.

Section 296, Title 28 U. S. Code provides that a justice

or judge assigned to another district may, notwithstanding his absence from such district or the expiration of the period of designation and assignment, decide or join in the decision and final disposition of all matters *submitted to him during such period,* and in the consideration and disposition of applications for rehearing or further proceedings in such matters. The act does *not* provide, and was never intended to provide that a judge may return after his period of designation and assignment to commence the trial of a case. Rather, it was the intention that he should be limited to finish any trial commenced by him, enter any decrees, orders or judgments on matters *that he had heard during the time of his designation and assignment.* The arraignment of the defendants in this case, taking the pleas of not guilty and setting the causes for trial over sixty days after the expiration of the assignment was not the commencement of the trial which would give him jurisdiction under either of the order of assignment or of the statute, relating to further time that might be required to complete unfinished business. The trial had not commenced within the period. The arraignment and pleas were completed. The period expired. No matter had been submitted to him for decision, or for him to join in a decision; no orders or decrees were to be decided or entered, and no incidental or supplemental matters as rehearings, motions for new trials, extending periods for filing records, etc. were pending or left unfinished on July 16, 1951.

In *McJordan* v. *Huff*, 133 F. 2d 408 (C. A. D. C.), it was held that while an arraignment was not a perfunctory proceeding, that in actual practice as conducted in the district courts, it was primarily to facilitate the fixing of the docket. The arraignment and plea is not the commencement of a trial of a criminal case; otherwise, it would be-

come necessary for the same judge who conducted the arraignment to conduct the trial before the jury.

McCall v. *United States,* 1 Dak. 1, 46 N. W. 608 at 611.

> "But in the case of *U. S.* v. *Curtis,* 4 Mason, 232, it was held that the word 'trial' in our act of 1790 means the trying of the cause by the jury, and not the arraignment and pleading preparatory to such trial."

This is sound law, because if the arraignment and pleas were considered the commencement of the trial before a particular judge, a defendant would be foreclosed from filing an application of prejudice against the judge. Commencing with *U. S.* v. *Curtis,* 25 Fed. Cas. 726, the arraignment and plea has been considered constituting no part of the trial. This distinction has been preserved by Rules 12 and 23 of the Rules of Criminal Procedure.

In *Frad* v. *Kelly,* 302 U. S. 312, 58 S. C. 108, 82 L. Ed. 282, the court further held that jurisdiction to hear and determine a matter after the expiration of the designation and assignment of a judge in a foreign district could not be conferred upon him by stipulation of the parties, nor can this objection to jurisdiction be waived, nor can an estoppel be raised against the defendants. A lack of jurisdiction, the court says, may be raised at any time.

The defendants made the specific contention in the Court below that the designation by Chief Judge Major of Judge Tehan to sit in the Western District until July 16 and for such further time as might be required to complete unfinished business did not authorize Judge Tehan to preside at the trial of the case on October 16, 1951. They urged that the trial of the case in which arraignment was had on July 9, 1951, at a later date was not "unfinished business" but was *coram non judice* and was void.

The Court of Appeals held:

"We think this conception arises from the erroneous construction of the order of assignment. This is a criminal proceeding which had its beginning in an indictment and the next step in which was, in the absence of interlocutory motions, naturally, arraignment of the defendants. At that time defendants pleaded not guilty. Obviously these pleas did not terminate the cause. The entire proceeding remained before the court for disposition upon the issue thus framed, that is, determination of the guilt or innocence of defendants. The proceeding remained unfinished, uncompleted until trial had been had and sentence entered.

"It was obviously the thought of the United States Attorney, counsel for defendants, Judge Major and Judge Tehan that Judge Stone's disqualification of himself as trial judge in this specific case necessitated assignment of another judge to the Western district for complete disposition of the cause. Had defendants pleaded guilty on July 9 and been sentenced, the proceeding would thereby have been terminated, instead of remaining unfinished or uncompleted. But this event did not occur,—instead, pleas of not guilty were interposed, raising an issue of fact to be tried by a jury or by the court.

"Under the Criminal Code and Federal Rules of Procedure, a criminal proceeding begins with the return of an indictment, as provided by Rule 6. When an indictment has been returned defendants have the right to attack its validity or sufficiency and if it is held sufficient they are then arraigned, as provided by Rule 10. Under Rule 11 they may plead not guilty, guilty, or with the consent of the court, *nolo contendere*. The obvious function of a plea of not guilty is to put the government to its proof and to preserve to defendants the right to defend; the proceeding can not be terminated, completed or finished by any other method. *Wood* v. *U. S.*, 128 F. 2d 265 (C. A. D. C.). We think it follows conclusively that, after Judge Stone's disqualification, when this proceeding was brought before Judge Tehan upon arraignment and pleas of not guilty

were entered, the criminal proceeding remained untried, uncompleted and unfinished, that the proceeding before Judge Tehan, consisting of arraignment, pleas of not guilty and a jury trial, culminating in a verdict of guilty and sentence, constituted completion of the proceeding and that until these events occurred, it was unfinished business. This is in accord with the rule that a judge who holds court for another district judge has authority to make any order in the case necessary to protect and preserve the rights of the parties thereto. *Hall* v. *McKinnon,* 193 F. 572 (C. A. 9)."

In this holding the court was clearly in error, in that Judge Major did not assign Judge Tehan to hear this particular case, but made an assignment for one week in the public interest and the interpretation made by the Court was contrary to the decision of this court in *Frad* v. *Kelly,* 302 U. S. 312, 58 S. C. 108, 82 L. Ed. 282, and is contrary to *United States of America* v. *Curtis,* 25 Fed. Cas. 726; *McJordan* v. *Huff,* 133 F. 2d 408; *Bell & Graddy, Inc. et al.* v. *O'Brien, et al.,* 113 S. W. 2d 560; *Hunnel* v. *The State,* 86 Ind. 431; *Commonwealth* v. *Soderquest,* 66 N. E. 801; *ex parte*: *Elvin E. Jeffcoat,* 109 Fla. 207.

It is true that the arraignment and plea did not finish the case and that the case remained before the Court for trial, but the Court was not Judge Tehan, it was the United States Court for the Western District of Wisconsin, and Judge Tehan had no assignment to sit therein after July 16, 1951.

The Court of Appeals in its opinion cited the case of *Wood et al.* v. *U. S.,* 128 F. 2d 265 (C. A. D. C.) for the proposition that the function of a plea is to put the Government to its proof and give the defendants the right to defend. This does not of itself mean that when the plea of not guilty is made or even if a plea of guilty is made and then changed that it was the commencement of a trial

itself. The case merely decided that an arraignment and plea is one of the steps in a criminal proceeding and therefore the evidence heard on a preliminary hearing, an earlier plea of guilty which was changed to not guilty could not be used as evidence against the defendants on the trial. It does not hold that the arraignment and plea was the commencement of a trial of a criminal case. It holds just the opposite, because any admission of guilt by the defendant in the trial could be used against him. This case by inference at least is an authority that the trial of a criminal case is not a part of the arraignment and plea and therefore would not constitute unfinished business within the meaning of the Federal Statute.

The Court below cited *Hall et al.* v. *McKinnon et al.*, 193 F. 572 (C. A. 9) to support its contention, but that case did not hold that a judge without an assignment could commence the trial of a case, but merely held that an assigned judge who was sitting in a district for another judge who heard a case had authority under his general order of designation and assignment to extend the time for the return of a writ of error and to make new orders in the case necessary to protect and preserve the rights of the parties, all of which is in accordance with the Statute.

In the case at bar no such situation existed, because Judge Tehan had no order of designation and assignment to hear the trial of this case on October 16, 1951.

The Court of Appeals held:

> "We are of the opinion further that the attack upon Judge Tehan's jurisdiction must fail for another reason. Inasmuch as there is no question but that he is a duly authorized district judge and that he purported to be acting upon an assignment which he believed gave him jurisdiction and, in pursuance thereof, performed the duties of a district judge under such color of right, the doctrine announced in many courts concerning officers and judges *de jure* and *de facto* is applicable."

This construction of the law is contrary to the decisions, is contrary to the statute and is contrary to any construction ever placed upon the statute in question.

Judge Tehan had no color of right to sit in the district court for the Western District of Wisconsin on October 16, 1951 and subsequent thereto. He had a designation and assignment in the public interest which commenced with July 9, 1951 and terminated on July 16, 1951. On that date, when his term of duty expired in the Western District of Wisconsin, nothing was committed to him for determination, or decision in this case or in any other case. He had no unfinished business. He heard no part of the trial of the case at bar during his designation. There was nothing incidental or supplemental for him to do in connection with the case at bar. As a matter of fact, the trial was not incidental or supplemental to the arraignment and pleas, but was the case itself. He had no assignment to sit in the Western District commencing with October 16, 1951 or any other date subsequent to July 16, 1951. The fact that he was a judge appointed to serve in the Eastern District of Wisconsin gave him no right, claim, color of right to act as a judge in the Western District of Wisconsin, save by a proper designation and assignment. This he did not have. His acts and doings in the Western District of Wisconsin commencing with October 16, 1951 were that of a stranger. He had no jurisdiction of any kind or character and all proceedings had were null and void and of no force and effect and all his acts and doings were a nullity. He had no jurisdiction. The Government in its answer to the petition for rehearing admitted that the majority rule was as we have stated, and we argued in the court below that Judge Tehan had no jurisdiction, unless the trial was unfinished business, but the Government contended that any case or cases that were filed in the court during the week of July 9 to July 16, 1951 while Judge

Tehan was there was unfinished business for Judge Tehan for all times in the future and that because the indictment was pending against these defendants and took their arraignment during that week that hence the trial within the meaning of the Federal Statute constituted unfinished business (Record page 63).

Judge Tehan's assignment made no reference to the case at bar. The affidavit of prejudice filed against Judge Stone was never acted upon. Suppose Judge Tehan had arraigned other defendants during this week. Would he have had jurisdiction without any further designation and assignment to return to the Western District and try these other cases? The Government laid great stress on the fact that he set a trial date in the cases at bar. If the proceeding had gone so far as to make the trial "unfinished business" within the meaning of the Federal Statutes, what difference would it make whether he set a trial date or not? Setting a trial date is merely arranging the docket or calendar. It could not operate to extend the period of assignment as "unfinished business" unless the trial is set and commenced within the designated period.

Assume that on October 16, 1951 Chief Judge Major had designated Judge Adair in the public interest to hold court in the Western District for a ten day period. No one would contend that Judge Tehan would have jurisdiction. Judge Adair would have jurisdiction because the commencement of the trial would constitute a new matter, and not "unfinished business".

The cases cited by the court below in its opinion are not cases that were relied on by the Government.

The Government cited no cases with the exception of one Illinois case and that case did not support its contention.

The court below cited *Luhrig Collieries Co. et al.* v. *In-*

terstate Coal & Dock Co. et al., 287 F. 711 for authority that "no attack could be made against the acts of a judge for whom at the time no assignment had been ordered". The case does not so hold. It holds that a *circuit judge sitting without his designation on file is a de facto judge. There was a designation* but *it was not filed.* This makes him a *de facto* judge. In the case at bar *there was no designation* and there was none filed and, therefore, he was not a *de facto* judge and had no right to sit. He had no jurisdiction. The court below cited *McDowell* v. *United States,* 159 U. S. 596. This case was cited to this court in the case of *Frad* v. *Kelly,* 302 U. S. 312, 58 S. C. 108, 82 L. Ed. 282, as authority for a judge sitting in another district and entering an order which is not vacated and unappealed must be conclusively presumed valid. This case is clearly distinguishable from the case at bar in that the judge was duly assigned to sit as the district judge in South Carolina. At the time of the appointment, court was held at Greenville, and thereafter, the place of holding court was changed by statute. The court held that this judge had an appointment to hold court in the district and Congress had a right to change the place of holding court. Therefore, the judge had an assignment to sit in the district and, therefore, he was a *de facto* judge if not a *de jure* judge. In the case at bar, Judge Tehan had no order of designation and assignment to sit at the time in question in the Western District of Wisconsin. In the opinion below, the court cited the case of *Norton* v. *Shelby County,* 118 U. S. 425 as authority for the claim that Judge Tehan was a *de facto* judge. This case is clearly distinguishable from the case at bar in that in the case cited there was an individual claiming an office, in possession of it, performing its duties and claiming to be such officer under a color of election or appointment as the case may be. In the case at bar, Judge Tehan was never the ap-

pointed Judge for the Western District of Wisconsin. He never pretended to be. There is no color of office involved in the case at bar. The rule cited by the Court below, as to color of office has no application to the case at bar.

The court below cited *Ball* v. *United States,* 140 U. S. 118 at pages 128 and 129 in connection with the determination that the said Judge Tehan was a *de facto* judge. It is distinguishable from the case at bar in that there was a designation and assignment for the period in question and for the further reason that the assigned judge's acts were attacked collaterally. In the case at bar there is a direct attack. Judge Tehan had no right or color of right to the office at the time of the commencement of the trial of this case.

The court below cites the case of *Rakes* v. *United States,* and six other cases, 163 F. 2d 771 at 773. That case, too, is clearly distinguishable from the case at bar in that in the case cited Judge Hutchinson was a judge of the *same* district as the judge who had presided at the trial of that case. He had jurisdiction as a judge of the same district court. He held the office of district judge of that district under his appointment the same as the trial judge. He had title to the office and the parties could consent and the court rightly decided though there had been a designation to hear the motion for a new trial. In the case at bar, Judge Tehan was not a judge of the district where the indictment was pending. He had no color of title to the office of district judge for the Western District of Wisconsin. He had no jurisdiction as judge of the District Court for the Western District of Wisconsin on October 16, 1951 because he had no certificate of appointment or designation and assignment to that office.

The Court next cites the case of *Wright et al.* v. *The Alaska,* 35 F. 555 at page 557 for authority that there could be consent and jurisdiction conferred in that man-

ner. This case, too, is clearly distinguishable from the case at bar. In the case cited there were two *civil* suits filed in two districts. There was an agreement that the determination in one case would determine the disposition of both cases to save two trials. There was no transfer or attempt to transfer the case from one jurisdiction to another. The one case was heard and by consent, the same judgment was to be entered in both cases. In the case at bar we have no such situation.

We have shown that the decision made by the Court of Appeals is directly in conflict with the decisions of this Court and is directly in conflict with the decisions of the courts of other circuits; that it is a matter of great public interest for this court to determine the validity of the acts and doings of the said district judge after his period of assignment had expired, especially in criminal cases where the life and liberty of citizens are involved. Thus, there is presented a question of great public importance to determine and of grave importance in connection with the administration of justice.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 169

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 66-70) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1954 (R. 71). The petition for a writ of certiorari was filed on June 25, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

After the only judge of the Western District of Wisconsin had, on petitioners' objection, disqualified himself, a judge of the Eastern District was appointed to hold court in the Western District "during the period beginning July 9, 1951, and ending July 16, 1951, and for such further time as may be required to complete unfinished business." The question presented is whether the judge so appointed had authority to preside at petitioners' trial in October, the date to which he had adjourned the case at the time of petitioners' arraignment on July 9, 1951.

STATUTES INVOLVED

28 U.S.C. 292(b) provides:

> The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

28 U.S.C. 296 provides:

> *Powers upon designation and assignment.*
>
> A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

STATEMENT

On December 18, 1951, in the Western District of Wisconsin, petitioners were convicted and sentenced on an indictment in fourteen counts charging the making of false oaths in a bankruptcy proceeding and conspiracy to make such oaths (R. 1, 18, 32). On appeal the convictions were affirmed as to all counts but one. 201 F. 2d 5. This Court denied a petition for certiorari, 345 U. S. 965.

Thereafter, on June 19, 1953, petitioners moved before Judge Tehan for arrest of judgment and for a new trial on grounds, *inter alia,* of newly discovered evidence (R. 1-7, 19). The denial of such motions (R. 8-10) was affirmed by the Court of

Appeals on February 26, 1954 (R. 18-28). In a petition for rehearing in the Court of Appeals, petitioners moved, for the first time, for an "order expunging all proceedings in the trial court subsequent to July 16, 1951", on the ground that Judge Tehan, who presided at the trial, had not been authorized to sit in the Western District of Wisconsin at such time and that therefore the trial proceedings were *coram non judice* (R. 31-42).

The contention was based on the following facts:

On July 2, 1951, petitioners filed an affidavit of prejudice against the sole presiding judge of the Western District. On July 5, the Chief Judge of the Court of Appeals for the Seventh Circuit appointed Judge Tehan of the Eastern District "to perform the duties of a District Judge and to hold District Court in the Western District of Wisconsin, during the period beginning July 9, 1951, and ending July 16, 1951, and for such further time as may be required to complete unfinished business" (R. 32-33, 72). On July 9, petitioners entered pleas of not guilty before Judge Tehan. After remarking that he must find a time for trial which would not interfere with his duties in the Eastern District, Judge Tehan set the trial for October 15, 1951, and entered an order summoning a jury. Judge Tehan presided at the trial which commenced on the date fixed by him (R. 66-67).

The court of appeals heard argument on this issue and then overruled it, holding that Judge Tehan had clearly been appointed for the purpose of trying petitioners' case in view of the disqualification of the regular presiding judge; that the

trial of the case was within the terms of the assignment, since it was completion of unfinished business which had begun with the pleas of not guilty on July 9, 1951; and that in any event Judge Tehan's *de facto* authority was not subject to attack (R. 66-71).[1]

ARGUMENT

Petitioners' contention, renewed in this Court, that Judge Tehan was without authority to preside at their trial, is completely answered by the opinion below. As was there pointed out, it is clear that under the circumstances which necessitated Judge Tehan's appointment it was understood by all parties that Judge Tehan would complete the disposition of petitioners' case. He clearly had authority "to make any order in the case necessary to protect and preserve the rights of the parties thereto" (R. 68). See *Hall* v. *McKinnon,* 193 Fed. 572 (C.A. 9). It necessarily follows that he had authority at the time of petitioners' arraignment to continue the cause with a view to its final disposition by assigning it for trial, either to a general calendar or to himself. Without objection from any party, he assigned it to himself for trial on October 15, 1951, in order to avoid any conflict with his duties in the Eastern District of Wisconsin. Such assignment for trial was the only course open to protect the rights of petitioners to a fair trial, for an assignment of the case to the general calendar would inevitably have placed petitioners in their

[1] Chief Judge Major was not a member of the panel which considered the issue, raised in the petition for rehearing, based on his designation of Judge Tehan.

original position, which Judge Tehan's designation was intended to obviate.

Obviously, the not guilty pleas entered by petitioners upon their arraignment did not terminate the criminal proceedings, which were initiated by the filing of the indictment against them. The trial was but another stage in the continuation of the same proceedings. See *Wood* v. *United States*, 128 F. 2d 265 (C.A.D.C.). Thus, Judge Tehan's assignment to himself of the trial of petitioners' cause was but a continuation of the criminal proceedings pending before him at the time of their arraignment, and was, therefore, "unfinished business" within the purview of the clause of his designation order which specifically extended the period of his designation for the purpose of completing matters of this kind.[2]

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[2] The provision in Judge Tehan's designation, specifying the contingency upon which his general judicial powers were to be continued, was not incompatible, as petitioners seem to imply (Pet. 9), with the provisions of 28 U.S.C. 296, which, except for certain functions incidental to the final disposition of matters handled by designated judges, limits the duration of their general judicial powers to the period of their designation. In the instant case, the exercise by Judge Tehan of his general judicial powers was limited by the designation order to a period to be measured by the occurrence of a certain contingency, the duration of which could not have been calculated in advance.

Furthermore, the cases, upon which petitioners rely (Pet. 7-12) in support of their contention, are inapposite. In *Frad* v. *Kelly*, 302 U.S. 312, 317, upon which they rely mostly, the proceeding which a designated judge undertook to conduct was not merely a continuation of uncompleted proceedings, but involved a "new matter", which arose subsequent to the final disposition of the criminal prosecution.

In any event, as the court below held, since Judge Tehan was a duly authorized district judge who "purported to be acting upon an assignment which he believed gave him jurisdiction and, in pursuance thereof, performed the duties of a district judge under such color of right", he had *de facto* status (R. 69). And, since petitioners recognized his authority, subjected themselves to his rulings, and sought appellate review thereof, they could not, for the first time, attack his authority in their petition for rehearing in the court below. See *Starr* v. *United States,* 164 U.S. 627, 631; *McDowell* v. *United States,* 159 U.S. 596; *Ball* v. *United States,* 140 U.S. 118, 128-129; *Norton* v. *Shelby County,* 118 U.S. 425, 445; *Rakes* v. *United States,* 163 F. 2d 771, 773 (C.A. 4); *United States* v. *Lindsley,* 148 F. 2d 22 (C.A. 7); *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.,* 287 Fed. 711 (C.A. 2), certiorari denied, 262 U.S. 751.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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